Committee on Resources

Witness Statement

Testimony Before

US CONGRESS

HOUSE OF REPRESENTATIVES

COMMITTEE ON RESOURCES

Issues and controversies relating to access across conservation system lands and other public lands in Alaska under the Alaska National Interest Lands Conservation Act

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by Ray Kreig

Chairman

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Thank you Mr. Chairman. My name is Ray Kreig. I am Chairman of the Kantishna Inholders Association and I am a property owner at Kantishna in Denali National Park. I am testifying on behalf of the Association.

On November 12, 1999 the National Park Service (NPS) published a proposed rulemaking on pages 61563 to 61572 of Volume 64, Number 218 of the Federal Register regarding, among other subjects, restriction of access on the Denali Highway ("Park Road") to private lands at Kantishna.

Kantishna Inholders Association strenuously objects to these regulations because their effect, in large part, is to abrogate the access guarantees made in the Alaska National Interest Lands Conservation Act (ANILCA)

to landowners and others with a property interest who were engulfed by conservation system units in Alaska, specifically those property owners located in the Kantishna Hills area of Denali National Park. And these rights are not merely for the benefit of landowners - they also provide many thousands of visitors possessing average physical, financial, and health limitations with the only way that they can have a meaningful, multiple day visit to the center of Denali Park.

The plain reading of the statute guarantees landowners economic and feasible access to their property - and this is reasonable considering the context at the time it was crafted and enacted.

Since the construction of the road into Kantishna in 1938, landowners have had the right of access and they exercised it without interference from the National Park Service (NPS). Prior to 1972, all park road traffic was unrestricted. Starting in 1972, the NPS started limited restrictions of traffic on the park road but traffic to Kantishna remained unrestricted.

President Jimmy Carter declared vast areas of National Monuments across Alaska in 1978. This action started a raging conflict between those who wanted to lock up as much of the state as possible and those who had a more balanced perspective recognizing that is it entirely possible for human habitation and economic activity to occur harmoniously as part of our Alaskan landscape.

ANILCA was a grand compromise. No party received everything that it wanted, but the deal crafted by Congress incorporated guarantees of access, and valid existing rights for communities, land owners, and residents enveloped in the new conservation system units. It was the presence of these solemn guarantees in ANILCA that substantially calmed the passions and fears of those who had been living and working in places like the thriving community of Kantishna when it was covered by the 1978 monument declarations.

That was the political environment that lead to these provisions in ANILCA:

"VALID EXISTING RIGHTS

Nothing in this title shall be construed to adversely affect any valid existing right of access." (16 USC 3169) ANILCA SEC. 1109.

"SPECIAL ACCESS AND ACCESS TO INHOLDINGS

...the State or private owner or occupier shall be given by the Secretary such rights as may be necessary to assure adequate and feasible access for economic and other purposes to the concerned land by such State or private owner or occupier and their successors in interest." (16 USC 3170) ANILCA SEC. 1110. (b) [See Attachment B for complete citation.]

LEGISLATIVE HISTORY

Congress specified "this provision directs the Secretary to grant the owner of an inholding such rights as are necessary to assure adequate access to the concerned land across, through, or over these Federal lands by such State or private owners or occupiers and their successors in interest. The Committee recognizes that such rights may include the right to traverse the Federal land with aircraft, motorboats, or land vehicles, and to use such parts of the Federal lands are necessary to construct safe routes for such vehicles" (emphasis added). H. Rept. 96-97, Part I, 96th Congress, pp. 239-240.

The Senate concurred and further emphasized that "this subsection provides the guarantee of an adequate and feasible alternative for economic and other purposes; that is, a route which will permit economic access to, and the use of such lands" (emphasis added). S. Rept. 96-413, 96th Congress, p. 249.

AGAIN, THE PLAIN READING OF THE STATUTE AND THE LEGISLATIVE HISTORY, AS STATED IN THE HOUSE AND SENATE REPORTS, IS THAT OWNERS - BOTH PRESENT AND FUTURE - OF INHOLDINGS SHALL BE GRANTED ACCESS, ECONOMIC AND PRACTICAL, TO THEIR PROPERTY. IN THE CASE OF KANTISHNA, THIS MEANS OVER THE PARK ROAD.

The proposed NPS regulations do not satisfy this requirement that Congress enacted to settle the contentious "d(2)"(1) issue in a way that guaranteed to those who were engulfed in the monument proclamations - as was Kantishna - hope for their economic future and confidence that they would be treated fairly by their government in the faithful administration of the intent of Congress. These guarantees were necessary in order to gain sufficient public acceptance in Alaska to reduce resistance to the legislation so that it could pass.

Notwithstanding the plain reading of the statue above, the NPS in these proposed regulations is: a) Imposing an annual cap of 1360 vehicle round trips on Kantishna inholders; b) Imposing specific allocations of access between existing Kantishna business operations; c) Decreeing that certain types of vehicles, such as RV's or motorhomes, are forbidden; and d) Decreeing that vehicle access rights will not be transferable if a business property is sold. None of this is provided for in ANILCA, and the attempt of the NPS to seize these access rights and interfere with the ability of a property owner to sell or borrow money based on the full bundle of their property rights is a totally unwarranted, capricious and arbitrary action.

The NPS advances no methodology on how the Park Superintendent would plan to allocate vehicle permits needed by future development of land at Kantishna. There is no basis in ANILCA for discrimination between two developed land owners at Kantishna (we note that there is an unsupported difference in the number of permits allocated between the three existing lodges). Furthermore, there is no basis in ANILCA for discriminating between developed and undeveloped property owners or "grandfathering" the level of access based on some past or current usage.

REGULATIONS SHOULD BE SEGREGATED

The NPS should immediately sever the Kantishna road access restrictions from the same process that is taking place with the snowmachine access regulations. The issues involved are very different. There is a separate lawsuit in progress on the snowmachine issue and it is inappropriate to mix (in fact camouflage) the Kantishna road access issue inside the snowmachine issue.

The proposed regulations are focused primarily on snowmachine issues arising from the ASSA v. Babbitt litigation. There are proposed temporary and permanent closures based on findings of resource detriment. In addition, the notice includes a sweeping proposed definition of "traditional activities" that will effectively restrict public access to tens of millions of public land in Alaska although the notice misleads the public by indicating that only snowmachine use in Old Denali Park will be effected. Lastly, the notice contains a number of very specific matters that impact only Denali National Park and Preserve and the rights and interests on private landowners within the

unit.

It appears that the NPS has deliberately created this regulatory hodgepodge to keep the public off balance and distracted from the far reaching consequences of the various proposed actions. This agency sleight of hand violates all principles of administrative law and sound public policy. Issues are being obscured so that it is difficult for the public to sort out precisely what the agency plans to do and what the real issues are. The purpose of notice and comment is to allow the public to clearly understand what an agency would like to do and to provide meaningful comments on the proposal to open minded public officials. Informed comments from an informed public enable an agency to make a more informed decision. None of these principles are being honored by the NPS in this rulemaking.

Corrective action must consist of separating the myriad issues in the proposed rulemaking into three components:

(a) Snowmachine closure proposals based on resource detriment (a specific Old Denali issue),

(b) The new definition of traditional activities that will impact guaranteed access on ALL National Park Service units in Alaska totalling over 45 million acres, and

(c) Other Denali management issues such as allocations of vehicle entry permits for Kantishna area private landowners.

Failure to segregate these matters is evidence of agency bad faith.

DEADLINES MUST BE DELAYED

Corrective action must consist also of providing additional time to allow for meaningful comments on all three issues. The two week extension granted after earlier complaints was completely inadequate and does not cure the problems associated with a public comment period that overlapped in substantial part with the holiday season of December and January. The NPS also has not provided a full and good faith FOIA disclosure.

There is no time sensitivity associated with the traditional activities proposal or the Denali management issues. Only the new proposed closures of the Old Park need to be dealt with promptly. Consequently, NPS must separate out the two issues without time sensitivity, publish new notices, and provide adequate time to elicit meaningful public comment. Any other action only demonstrates that the agency has a fixed political agenda and is only going through the motions vis a vis truly being interested in and responsive to public input.

The NPS failed to properly notify the affected landowners and stakeholders in Kantishna of the intended publication of the proposed regulations in the Federal Register. A few landowners were told that the NPS intended to work on regulations, but is it too much to expect that the few dozen directly affected parties would be given the courtesy of a certified letter advance notice of the published regulatory proposal that has such a drastic effect on their future? Is it good faith to quietly bury the road access regulations in the Federal Register timed to appear prior to the Thanksgiving and Christmas holidays - and even then - not tell landowners with a certified letter that they had been published? No one routinely reads the Federal Register with their morning coffee!

On December 21, 1999, a Freedom of Information Act (FOIA) request was filed for a copy of all records, documents, reports, memorandum, correspondence, and other writings that support the supposed rulemaking. Only four items(2) were sent in response to this request, three of which the NPS surely knows that we already have. We have subsequently learned that the NPS has in the past openly discussed several studies of impacts of road traffic on wildlife that were not included in the response to our FOIA request.

We have now filed a second FOIA request asking for these studies and other items that were not sent in response to our original all-encompassing request. Obviously, these materials were not available to us prior to the close of the comment period on January 25. Therefore, our ability to make a fully informed and responsive comment to the proposed rulemaking was severely inhibited.

For all of these reasons, we strongly urge the NPS to sever the Denali Park road access matter from the snowmachine regulations and to provide at least a four- to six-month delay in the comment period. We ask:

- What is the urgent and overriding reason for the short comment period?
- What is the need for the apparent secrecy in rushing this regulatory proposal through?
- What is the new threat or peril that the NPS is trying to head off in the next four to six month period that mandates that these regulations be "fast tracked"?

PREVENTION OF FUTURE VISITOR ACCESS

As for currently undeveloped properties, the regulations proposed have no flexibility built into the system. They do not recognize that there are landowners at Kantishna that may have future plans for their property that will need to use the access rights that are plainly granted to them in the ANILCA compromise. Future provision of additional visitor facilities at Kantishna is in the public interest because it will make it possible for more Americans to visit their park - a park they have supported with their tax dollars and have every right to visit, see, and enjoy, as has eloquently been described by landowner Don Phillips in his testimony:

"The proposed changes in access appear to be misguided and unnecessary. They are yet another attempt to deprive both the inholders and the U.S. citizens of their rights to visit and use this park...Surely high value comes from watching those rather magnificent mountains, observing or walking the meadows, walking the creeks, enjoying the surroundings, just being there. This is not something that can be done on a four or six hour bus ride. People need the opportunity to spend a few days to really absorb the scenery and environment. People need to get into the back country, Kantishna, Stampede, the hills, and experience this awesome area. It is a life changing experience. Isn't this the purpose for the park?...[Now] those with limited time, money or health are pretty well confined to the entrance area and the first half of the park road. The back country is pretty well restricted to the healthy and the wealthy. The campgrounds fill up and even the busses sell out. Most visitors are crowded into very small areas, virtual prisoners of the park busses....Current policy primarily supports the young, healthy, wealthy, and fortunate few."

RULEMAKING FORMAT AND INACCURATE STATEMENTS

Statements in the proposed rulemaking preamble are inaccurate and misleading. On page 61565 of the proposed rule, it is stated by NPS that "no comments were received opposing the overall

level of 10,512 motor vehicle permits", and later, "NPS received a few comments that raised questions about the distribution of vehicle permits among Kantishna lodges." Since some talk began in the early 1980's about limiting access to Kantishna, Kantishna property owners and stakeholders have vigorously and continuously questioned imposed overall limits as well as rejected arbitrary or discriminatory allocations between landowners if such limits affected the ANILCA access guarantees. These objections have been made in person, by letter, and numerous other interactions between landowners and the NPS.

We find that the form of the rulemaking is odd, vague, and uninformative. In Section 13.63 on page 61571, the actual rulemaking itself appears to be a series of questions and answers rather than a tightly constructed, well thought out series of criteria that clearly lay out a frame of reference for guidance of the Superintendent as he adjusts to future changed conditions and access requirements. This is absolutely unacceptable for a proposal that would give him life or death authority over the viability of a business.

TRAFFIC SAFETY

The NPS has raised the concern of traffic safety as a justification for the allocations made in the proposed regulations. If the NPS intends to restrict travel to Kantishna based wholly or in part on safety concerns, then the regulation should discuss in more detail what the actual impact of inholder access is on bus accidents. Did any of the previous accidents even involve inholder traffic to Kantishna? Are their other ways to improve safety?

SIMPLISTIC, RIGID NPS APPROACH TO A COMPLEX CHALLENGE

If access needs to be restricted, are there more flexible ways of managing access such as trading off nighttime versus daylight access hours, other modes such as a railroad, additional North Access return loop, airport improvements at Kantishna, etc? Focusing all on crude vehicle count is too simplistic. There should certainly be more discussion of whatever scientific basis is being claimed to support the overall vehicle limits. There should be a summary of these studies, as well as a listing of them, or a website where they are listed and discussed. The summary should include what exactly it is about vehicle traffic that is claimed to be affecting the wildlife - and what other mitigation could be applied other than reducing the number of vehicles (for example, if it is dust affecting the wildlife, would the use of dust palliatives or paving reduce the impact and allow more visitors to see their park?)

TAKINGS ASSESSMENT AND SMALL BUSINESS AFFECTS

This proposal is a serious taking of property rights and values yet the rulemaking claims that the "Takings Implication Assessment" (E.O. 12630) is not required (page 61570). Any professional real estate appraiser will advise the NPS that stripping away the access to a property will drastically reduce its value. The perfunctory addressing of takings in the rulemaking needs substantial expansion to justify the absence of a takings implication assessment.

The interference in access to property contemplated by these regulations will have a severe affect on current as well as future businesses at Kantishna. These businesses are likely to qualify as small business entities under federal law. The discussion (page 61569) on whether this proposed rule making has satisfied the requirements of the Small Business Regulatory Enforcement Fairness

Act of 1996 (SBREFA) is inadequate. This NPS statement is obviously untrue as it applies to Kantishna:

"This rule ...will not cause a major increase in costs or prices for consumers, individual industries...and does not have significant adverse effects on competition, employment, investment... The analysis found that no significant costs would result from this action." (Page 61569)

Withdrawal of access will be the death knell to enterprises in Kantishna and it will reduce the benefits that competition would bring to the provision of visitor services in and near Denali National Park. It will raise the cost that these visitors will have to pay and it will reduce the choices that they have to enjoy their park.

In addition, the empowerment of the Park Superintendent as the sole decision-making authority on whether a business may sell or retain whatever access is granted will greatly increase business risk and make long-term financial forecasting for a lender impossible. This will greatly increase the difficulty, if not make it impossible, for a property owner to finance their business.

AGENCY EXPERIENCE IN FAITHFULLY EXECUTING INTENT OF CONGRESS

Investing a Superintendent with such life or death authority over the welfare of a small business highlights another issue: Does the Park Superintendent have an irreconcilable conflict of interest in this role? There is a history at Kantishna of problems when the NPS takes on quasi-judicial functions.

In the U.S., mining claim adjudications for over a hundred years have been performed by an independent third party such as the Bureau of Land Management and its predecessor agencies. Apparently, wanting to control and manipulate the process itself, the NPS took over performance of claim validity determinations at Kantishna. Since the NPS had its own agenda of ending all the small family-run mining operations at Kantishna, the impartiality of its validity determinations was highly suspect.

The problems with this conflict of interest situation were well described in testimony before Senator Murkowski's 1994 hearings on Mining Activities in Alaska National Parks (Senate Hearing 103-577). How would the lack of trust not be the same if the Superintendent is now vested with a life or death authority over businesses and landowners that the NPS wants to wipe out as soon as possible?

The 1917 enabling act for the establishment of Mount McKinley National Park, now Denali, directs the Secretary of the Interior through the NPS to manage the park in a way that encourages visitation. But in the proposed regulations, the NPS selectively quotes (64 Fed Reg 61563) from statute to suit its agenda of limiting use and visitation to Kantishna and other core areas in the Park:

In 1917, Congress established Mount McKinley National Park to "set apart as a public park for the benefit and enjoyment of the people . . . for recreation purposes by the public and for the preservation of animals, birds, and fish and for the preservation of the natural curiosities and scenic beauties thereof . . . said park shall be, and is hereby established as a game refuge" (39 Stat. 938).

This four line quote leaves the reader with the impression that while the Park may have been set aside for

the enjoyment of people and for recreation purposes, more emphasis was placed on preservation of natural features and curiosities and scenic beauty, and especially its establishment as a game refuge. Actually, there is quite a different impression gained from reading the entire law.

Attachment A is a side-by-side where the complete Denali National Park enabling statute that remains in force today may be read and compared to the fragments the NPS has chosen to present as support for its rulemaking.

What has the NPS edited out?

In Section 351 they redacted a clause directing the executive authority of the Secretary of the Interior [ie the NPS] to establish regulation "primarily aimed at the freest use of the said park for recreation purposes by the public"!

Why did the NPS omit this key passage, which is critical to an understanding of the Denali Park original framers' intent for the purpose of the park? How does their regulatory package satisfy the spirit of the park enabling act?

It should also be noted that the intent of Congress to encourage ease of visitation was so great that in Section 353 they gave specific authority to the Secretary of the Interior to execute leases to parcels of ground throughout the Old Mount McKinley Park, of up to 20 acres for up to 20 years, whenever the ground is necessary for accommodation of visitors.

BOTH OF THESE PROVISIONS HAVE STOOD THE TEST OF TIME. THEY HAVE REMAINED UNCHANGED SINCE 1917, GONE THROUGH 41 CONGRESSES AND MANY AMENDMENT CYCLES TO THE DENALI PARK SECTION OF THE US CODE.

Clearly the original vision for the purpose of Mount McKinley Park, as well as that of succeeding Congresses, contemplated a favorable consideration of measures encouraging, not limiting, visitation to the park as the 11/12/99 NPS proposed regulations are attempting to do.

NPS AS IMPARTIAL ADMINISTRATOR? - THE SPRUCE CREEK DEIS

The recent process involving granting of ANILCA guaranteed access to the owners of twenty acres of land on Spruce Creek in Kantishna is cause for great concern. The NPS is putting these owners through an enormous amount of expense and risk by making the application process burdensome and tortuous. We see parallels to the situation NPS imposed upon the miners previously discussed.

The NPS has required the preparation of a Draft Environmental Impact Statement (DEIS) for this little gravel road and bush airstrip project that is many times more detailed and costly then can be justified by valid scientific assessment of real or imagined environmental threats from the project. Remember that the road would go through an existing area of historic mining activity and the owners have offered to help the NPS rehabilitate old mine workings near the road as they perform their road improvement and construction work.

Compare the NPS demands on the minuscule $200,000 Spruce Creek project to the DEIS that the Defense Department had to prepare for the massive $2 to $10 billion National Missile Defense (NMD) Deployment (Attachment C) involving the construction of 100 missile silos, a Battle

Management, Command and Control Facility, and a thousand mile-long submarine fibre optic cable to the Aleutian Islands. The NMD DEIS probably cost about 0.3% of the project cost; NPS could well be causing more to be spent on the Spruce Creek DEIS then will be spent to actually construct the nine miles of narrow gravel road itself! The whole NMD DEIS runs 1209 pages while the NPS has produced a 425 page DEIS for Spruce Creek, a project that has only 0.003% of the cost of the NMD. THESE FACTS STRONGLY IMPLY AN NPS REGULATORY OVERKILL FACTOR 150 TO 1300 TIMES WHAT IS REASONABLE!

Neither Kantishna land and business owners - nor the future visiting public in search of choices in accommodations - can rely confidently on fair treatment and execution of Congressional intent unless NPS practices are changed and much more closely monitored.

CONCLUSION

There should be no misunderstanding: Landowners value park resources and recognize that the capacity of the current park road is not unlimited. It is in no one's interest to encourage a situation where such heavy levels of traffic occur that the values which bring visitors to the park, and to Kantishna, are damaged. However, the Kantishna Inholders Association feels that the proposed access regulations are heavy handed and overreaching. They are not in the public interest. We do not think that the NPS has proved its point through an objective, preferably third party, peer-reviewed, scientifically valid study that these access controls are necessary to produce measured improvement or protection of environmental values.

Finally, once again: **The plain reading of the statute and the legislative history as stated in the Congressional reports, is that current and future owners of inholdings shall be granted economic and practical access to their property. In the case of Kantishna, this means over the Park Road**. ***And this granted access benefits not only inholders but also the many thousands and thousands of people who otherwise would be unnecessarily denied an opportunity for a meaningful visit to their Denali National Park and the Kantishna Hills area.***

These proposed regulations are a crude, heavy handed, and illegal patch for a complex challenge. The NPS should stop and think this through! Slow down; separate out the three subjects from the proposed rulemaking immediately; and take much more time to do the two that are not time-critical RIGHT! Start some joint work with the inholders to work together on solutions and assess how bad the problem really is. We all should expect and do a much better job to find a smart solution, not accept this very unwise solution merely because it appears expedient.

Thank you Mr. Chairmen for providing this forum for examining this matter.

Sincerely,

KANTISHNA INHOLDERS ASSOCIATION

[SIGNED AND TRANSMITTED ELECTRONICALLY]

Ray Kreig

Chairman cc: Honorable Ted Stevens

Honorable Frank Murkowski

Governor Tony Knowles

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1. So called from Section 17(d)2 of the 1971 Alaska Native Claims Settlement Act that provided for 80 million acres of land set asides for National Parks, Wildlife Refuges, Forests, and Wild and Scenic Rivers.

2. A copy of ANILCA Section 1110; a copy of the 1986 General Management Plan; and a copy of the 1997 Entrance Area and Road Corridor Development Concept Plan. The only new item provided was a 22 page report entitled "1996 Park Road Traffic 1979 to 1995".

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